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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 762

HOMER LESTER BARTCHY, ALIAS HOMER BROOKS,
Petitioner,

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit,

AND BRIEF IN SUPPORT THEREOF

BERNARD A. GOLDING,
Counsel for Petitioner

ALPHA LAW BRIEF CO., HOUSTON

SUBJECT INDEX

LIST OF AUTHORITIES

CASES

CONSTITUTION OF THE UNITED STATES

UNITED STATES CODE

JUDICIAL CODE

IN THE

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THE MATTER INVOLVED

Summary of the Matter Involved

The matter involved is the correctness of a decision of the Circuit Court of Appeals, in a criminal case, holding that Petitioner, a seaman in the service of the American Merchant Marine, was properly convicted for failure to report to his local draft board for induction.

Petitioner's defense was, and, still is, that the local Draft Board was properly advised, by letter, of his permanent ad-

dress, prior to the time notice of induction was mailed him; that the Draft Board in disregard of his notice of his permanent address sent him such induction order to a prior address given by him, as a consequence of which he never received the notice to report for induction. Further, the local Draft Board and other authorities continued this prosecution notwithstanding the fact that within the 15 days provided for in the regulations properly enacted by the Selective Service Board, Petitioner presented himself for induction in order that he may stand purged of any alleged delinquency.

Statement

For brevity's sake, and since we cannot more succinctly state the facts upon which Petitioner was indicted and ultimately convicted, we ask liberty to quote the *undisputed* facts, as set forth in the dissenting opinion of MR. JUSTICE HUTCHESON:

> "These are the undisputed facts as the record discloses them: Defendant was registered with Local Draft Board No. 9 in Houston, Texas. When he registered he gave his address as 7428 Sherman Street, Houston, Texas. He completed his selective service questionnaire, was given a preliminary physical examination, and was, on January 20, 1942, classified 1-A by the Board. On February 3, 1942, Appellant was given an Army physical examination. At the time of his physical examination the address which the Board had for the registrant was 7543 Harrisburg Boulevard, Houston, Texas. On about February 4, 1942, the Appellant came to the office of the Local Board and asked how much time he would have before induction. He was advised that he would be inducted in about twenty-five or thirty days. On February 10, 1942, Appellant advised the Board by letter that he was shipping as a seaman aboard the steamship Caliche, and gave his address as the National Maritime Union, 8045 Harrisburg Boulevard, Houston, Texas:

"Tuesday, Feb. 10, 1942.

Selective Service Board No. 9,
504 Hermann Bldg.,
Houston, Texas.

Dear Sirs:

In accordance with your regulations, I am notifying you that I have today shipped as a seaman aboard The S.S. Caliche. I have asked the Company and the office of the National Maritime Union, 8045 Harrisburg Blvd., to also notify you.

I do not want you to in any way believe that I am seeking to safeguard my life from service on behalf of our countries fight against Hitlerism. On the contrary I am told that because of recent sinkings the casualty list among Merchant Seamen is as high or higher than in any other section of Service.

However, I prefer service in the Merchant Marine to any other branch of service because of the dependent which I have acquired recently—too recently to be recognized by your board—and since the Maritime Commission and the Federal Government have appealed for young men to join the Merchant Marine to replace those being sunk and to man the new ships being built I have volunteered for this branch of our countries defense effort.

In the event that you do not consider my service as an active seaman deferable you may communicate with me at my new mailing address 8045 Harrisburg Blvd., care National Maritime Union. The trip I am shipping on will not last more than two weeks, and since I have not received from you yet either the final report on my physical examination, or an order giving me the date of induction, and since I was told by your board that I would have from 25 to 30 days after my physical examination (most probably), I believe that in the event you decide to induct me into the army that I shall

be back in Houston before the effective date of induction.

Please send your decision to me at 8045 Harrisburg Blvd., Houston.

Sincerely yours,

HOMER L. BARTCHY,
HOMER LESTER BARTCHY,
8045 Harrisburg Blvd.,
Order No. 2671.11."

On the same date Appellant advised the Board by telegram that he was sailing on the steamship Pan-Main. On February 11, 1942, the Appellant actually sailed aboard the steamship Pan-Rhode, Island arriving in New York on February 20, 1942. There he went to the New York office of the N. M. U. and reported to James Merrell, the person in charge for N. M. U. of placing and keeping up with men furnished by it for signing on merchant vessels. Explaining his situation fully and telling Merrell that he expected to hear from his draft board by a communication forwarded from the N. M. U. office in Houston to the N. M. U. office in New York, and charging Merrell to send it at once to him, defendant on February 25, in New York signed on the steamship American Packard for a foreign voyage, expecting to be notified if called by the Board. He remained on board this vessel continuously from Feb. 25, 1942, until March 11, 1942, awaiting its departure, as it was being delayed by repairs and other things, and he was required to be there and ready at all times. Before he left Houston he explained the whole thing to the agent for the N. M. U., whose office he had given as his address there and asked that all communications be forwarded. On February 20, 1942, an order to report for induction was mailed by the Local Board directing the Appellant to report on March 4, 1942. This order was mailed not to the address last given but to 7543 Harrisburg Boulevard. This order found its way to the National Maritime Union office at 8045 Harrisburg Blvd., Houston, Texas, and was forwarded to the National Maritime Union office at New

> York, where it was received by James F. Merrell, and returned by him to the Local Board. Communicated with by the Board, after they had received the return of their induction order, Merrell explained the situation fully to them, pointed out the great necessity for men on merchant ships and urged the Board to defer defendant until he could make the trip he had undertaken. Without following the regulations which require the board to carefully consider whether a person registered is a willful or unintentional violator, the Board proceeded to turn the matter over to the District Attorney for prosecution, and the prosecution was immediately instituted. When advised that the Board considered defendant delinquent, Merrell made further inquiry, found that defendant's ship had not sailed, notified him that the F. B. I. wanted him on a charge in Houston, and defendant came in and surrendered" (R. 238-244).

Upon these facts Petitioner was indicted: (a) With failure to report for induction into the Armed Forces of the United States, under the provisions of "The Selective Training & Service Act of 1940;" (b) With failure to keep his Draft Board informed *at all times* of the address where mail would reach him as required by Regulation 641.3 (R. 4-6).

The trial court found Petitioner "not guilty" under the First Count of the indictment *because the indictment was insufficient to support a finding that Petitioner had notice or knowledge of the order of the Draft Board to report.*

The trial court found Petitioner "guilty" under the Second Court (R. 14-16).

Petitioner was sentenced to sixty days in prison, to be designated by Attorney General on Count Two of said indictment (R. 12).

The Circuit Court of Appeals affirmed, MR. JUSTICE HUTCHESON dissenting (R. 235-244).

Jurisdiction

The judgment of the Circuit Court of Appeals, MR. JUSTICE HUTCHESON dissenting, was entered on December 23rd, 1942 (R. 235-244).

A petition for rehearing was denied, Mr. JUSTICE HUTCHESON dissenting, on January 26, 1943 (R. 252).

The jurisdiction of this Court rests upon Section 240(a) of the JUDICIAL CODE, as amended by the Act of February 13th, 1925, being Title 28, Section 347(a), U.S. Code.

Questions Presented

Whether a conviction for an alleged violation of a regulation of the Selective Training & Service Act shall be permitted to stand when:

1. A seaman in the service of the American Merchant Marine admittedly notified, by letter, his local draft board advising it of his last change of permanent address and the Draft Board in disregard of such written notice—received prior to his call for induction—forwards notice of induction to an improper address which was never received by such seaman;

2. A seaman in the service of the American Merchant Marine having given his local Draft Board his permanent address in compliance with the very regulation of which he was convicted; the Draft Board having sent notice of induction to an improper address and was therefore never received by him;

3. A seaman in the service of the American Merchant Marine when learning of his alleged delinquency presents himself for induction within the fifteen-day period, as provided by law, yet was denied the right provided in such regulation to purge himself of any delinquency;

4. By the action of those in authority, Petitioner was refused the right to purge himself of an alleged delinquency within the fifteen-day period provided for by law;

5. All of the evidence was without dispute that Petitioner kept his local Draft Board advised of the address where mail would reach him, and the Draft Board failed to mail his induction orders to the address given by Petitioner.

6. The indictment itself charged no violation of the laws, and was so indefinite and uncertain as not to inform Petitioner of the charge against him;

7. The evidence was as consistent with innocence as with guilt; and

8. The circumstantial evidence did not exclude every reasonable hypothesis of innocence.

Statute and Regulations Involved

U. S. C., Title 50, Sec. 311;
Selective Training and Service Act of 1940, Regulations 641.3; 642.1-642.5.

They appear in the Appendix, page 17, et seq.

Reasons Relied on for the Allowance of the Writ

1. The question involved in this case is one of Federal Law, which has not been, but should be, settled by this Court. A large majority of the population of the United States is subject to the provisions of the Selective Training & Service Act of 1940, and the majority decision of the Circuit Court of Appeals, if permitted to stand, leaves in confusion the proper application of certain Draft Regulations (641.3; 642.1-642.5), and a decision by this Court seems necessary to enable Draft Boards to properly administer

the Regulations promulgated under said Act, and to provide a rule of conduct for all citizens subject to the Act.

2. Because the case involves a question of gravity and general importance which it is in the public interest to have decided by the Court of last resort. The question involved is far reaching in its application and importance. The decision of the Circuit Court of Appeals affects many thousands of American youths, who are amenable to the Draft Laws.

3. A review of the decision of the Court below is of importance in the administration of the Selective Training & Service Act of 1940.

4. Because of the importance in the administration of justice of the problem raised.

Prayer

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and the proceedings of the Circuit Court of Appeals had in the case numbered and entitled on its docket 10333, HOMER LESTER BARTCHY, ALIAS HOMER BROOKS, *Appellant*, v. UNITED STATES OF AMERICA, *Appellee*, to the end that this cause may be reviewed and determined by this Court, as provided by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court; and for such further relief as this Court may deem proper.

BERNARD A. GOLDING,
Counsel for Petitioner

Dated February 20th, 1943.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.....

HOMER LESTER BARTCHY, ALIAS HOMER BROOKS,
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UNITED STATES OF AMERICA, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court below

The opinion of the court below, the United States Circuit Court of Appeals for the Fifth Circuit, has not been reported at the time of the preparation of this brief, but this opinion is dated December 23, 1942, and is attached to this brief as an exhibit. It appears in the Record on pages 235-244.

Statement of the Case

This has already been stated in the preceding Petition (on

pages 2-5) which is here adopted and made a part of this brief.

Specifications of Error

THE CIRCUIT COURT OF APPEALS ERRED:

1. In holding that Petitioner failed to advise his Local Draft Board where mail would reach him.

2. In holding that the acts and conduct of the Local Draft Board, and those in authority, did not deprive Petitioner of the benefit of the presumption of innocence and the right to purge himself of any delinquency.

3. In holding that Petitioner was negligent in keeping his Local Draft Board advised of the address where mail would reach him.

4. In overruling a demurrer attacking the validity of the indictment in both counts.

5. In failing to hold that the indictment was insufficient in law because it is vague, indefinite, and fails to charge a violation of law which may properly be made the basis of an offense.

6. In failing to hold that the evidence in this case demonstrated beyond a reasonable doubt Petitioner's "guilt" under the second count of this indictment.

7. In failing to hold that the second count in said indictment failed to state facts sufficiently to show that Petitioner had violated the regulation (641.3) in question and that he was "guilty" of the offense sought to be charged in said count.

8. In failing to hold that Petitioner did not avoid a duty in keeping advised the Local Draft Board of his address where mail would reach him.

Summary of Argument

1) PETITIONER ADVISED DRAFT BOARD OF ADDRESS WHERE MAIL WOULD REACH HIM

The indisputable evidence in this case shows that Petitioner notified the Draft Board, in writing, of his permanent mailing address, and where mail would reach him, prior to the mailing by the Draft Board of its "notice of induction;" that the Draft Board mailed both the "notice of induction" and "notice of suspected delinquency" to the wrong address, hence, were never received by Petitioner, and he had no notice whatsoever of these "notices."

2) PETITIONER WAS DEPRIVED OF THE RIGHT, GRANTED UNDER THE LAW, TO PURGE HIMSELF OF "ALLEGED DELINQUENCY"

The evidence clearly shows that Petitioner, when he learned of "notices" having been issued by the Local Draft Board, *but mailed to the wrong address,* Petitioner immediately reported and sought, opportunity to "purge" himself of delinquency.

3) INSUFFICIENT INDICTMENT

The indictment charges no crime under the Federal laws. It fails to inform Petitioner "of the nature and cause of the accusation," against him (CONST., Art. VI) or to sufficiently define the charge in the second count so as to enable him subsequently to avail himself, upon a further prosecution for the same cause, of his right to immunity from double jeopardy (CONST., Art. V).

4) PROOF IS INSUFFICIENT

The evidence in the record clearly shows that Petitioner never received any notices or Reports to report for "In-

duction," or as to alleged "delinquency," the absence of which leaves no room for doubt that the conviction on the second count is not sustained.

5) Conviction on Second Count Is Not Sustained by Competent Proof Beyond a Reasonable Doubt

The trial court held in its memorandum opinion (R. 14), that Petitioner "had neither notice or knowledge of the order of the Draft Board directing him to report;" that being so, the conviction is not justified since the proof did not exclude every reasonable hypothesis of innocence.

6) Utter Lack of Evidence

The evidence in the record fails utterly to show that Petitioner avoided any duty connected with his Registration, or that he had any knowledge of the mailing of any Report or Notice by the Board, at any time. There was no evidence of any kind, either direct or indirect, that Petitioner was aware of his induction by his Draft Board. The proof offered shows that the Local Draft Board completely ignored Petitioner's communication advising the Board of his "change of address," and flagrant violations of the Board's Regulations tantamount to unjust discrimination. No shred of evidence indicates "guilt" by Petitioner. At most, his political beliefs were contrary to those generally accepted. There is not even a showing that, in any specific instance, Petitioner was in any respect remiss in his obligation. The record wholly fails to sustain the conviction.

Argument

Petitioner, by letter, notified his Local Draft Board on February 10th, 1942, that his permanent address was 8045 Harrisburg Blvd. On February 20, 1942, his Local Draft Board mailed a "notice of induction" to 7543 Harrisburg

Blvd., Houston, Texas, directing him to report on March 4, 1942. This notice was returned to the Draft Board, "undelivered." On March 9, 1942, the Draft Board mailed a "notice of suspected delinquency," which likewise did not reach Petitioner, directing him to communicate with it on March 15, 1942.

When Petitioner learned of such notices, he surrendered to the authorities on March 11, 1942. He then sought an opportunity to "purge" himself but was denied this privileg , notwithstanding the provisions of Selective Training and Service Act Regulations (641.2-642.5).

Such notice having been sent to an address other than that designated by this Petitioner, could not satisfy the requirements of the Selective Training and Service Act, hence, such notice not only lacked legal effect, but could not have the effect of bringing the Petitioner into the Military Service. This issue has been resolved in the case of ALLEN v. TIMM, ET AL. (C.C.A. 7th), 1 F. (2d) 155, 157:

> "Pelican Rapids was not Appellant's 'last known address.' He never received mail there, nor sent mail from there. His father did not tell the mail man that that was appellant's address; on the contrary, he said the address was Page, N. D. There was no justification for ignoring the address given in the registration card. Appellant gave that as his address and was entitled to have notice sent there until changed by him.
>
> Respondent's answer relied, and the government here relies, solely upon the sufficiency of the notice sent to Pelican Rapids. It did not satisfy the requirements of the Selective Service Regulations. All notices should have been sent to the address given, and they would have been effective, whether received or not. We are of opinion that the evidence is insufficient to show that appellant was ever inducted into the military service."

Having received no notices to report for Military Service,

Petitioner could not be declared a "delinquent," nor a violator of the Selective Training and Service Act. U. S. v. WHEELER, 65 L. Ed. 270; FARLEY v. RATLIFF (C.C.A. 4th), 267 F. 682; EX PARTE GOLDSTEIN, 268 F. 431.

The right to "purge," granted all registrants under the cited Regulations, is but a segment of Democratic Civil Liberties. And, "Civil Liberties are too dear to permit conviction for crimes which are only implied and which can be spelled out only by adding inference to inference." (MR. JUSTICE DOUGLAS in U. S. v. CLASSIC, 61 S. Ct. 1045-1046.) The circumstances in the instant case did not give the Draft Board power to cause Registrant to be summarily arrested, indicted and sentenced, and the right to "purge" himself denied, hence, the judgment rendered in this cause finds no rational basis. (MR. JUSTICE STONE in U. S. v. CAROLENE PRODUCTS Co., 304 U.S. 144, 152 N.)

The holding of the Circuit Court of Appeals (majority decision), is a serious departure from established principles, on issues of Reasonable Doubt and Insufficiency of Evidence.

> " * * * probability is not a guide which a court, in construing a penal statute, can safely take." It is one thing to allow wide and generous scope to the express and implied powers of Congress; it is distinctly another to read into the vague and general language of an act of Congress specifications of crimes. We should ever be mindful that "before a man can be punished, his case must be plainly and unmistakably within the statute, "United States v. Lacher, 134 U.S. 624, 628, 10 S. Ct. 625, 626, 33 L. Ed. 1080. It is not enough for us to find in the vague penumbra of a statute some offense about which Congress could have legislated and then to particularize it as a crime because it is highly offensive. Cf. James v. Bowman, 190 U.S. 127, 23 S. Ct. 678, 47 L. Ed. 979." (MR. JUSTICE DOUGLAS in U. S. v. CLASSIC, 61 S. Ct. 1045.)

Guilt is determined by a showing that a person has been so found "beyond a reasonable doubt." (MR. JUSTICE REED in WARSZOWER v. U. S., 61 S. Ct. 603, 606.) This attribute is entirely lacking in this conviction.

To reach the conclusion that the evidence, standing by itself, meets the requisite tests for conviction, would indeed be a departure from irrefutable principles of justice and, in their place, substitute a melancholy doctrine.

It is all too plain for argument that:

> "It is highly important, of course, that this and all other criminal laws should be strictly enforced, but it is of far greater importance that a citizen should not be imprisoned and deprived of his liberty under a judgment based on no surer foundation than mere guesswork and speculation. This rule is elementary. DeLuca v. U. S. (C.C.A.), 298 F. 412; DeVilla v. U. S. (C.C.A.), 294 F. 535; Turinetti v. U. S. (C.C.A.), 2 F. (2d) 15." (MR. JUSTICE RUDKIN in BENN v. U. S. (C.C.A. 9th), 21 Fed. (2d) 962.)

Not desiring to prolong this argument longer than absolutely necessary, we say, that the majority decision of the Circuit Court of Appeals, has positively, unequivocally, plainly and clearly held that a person amenable to the draft laws, although he receives no legal notice whatsoever of his induction, and the plain facts demonstrate that Petitioner is not culpable or remiss in his duty to serve his country, he may, nevertheless, be indicted, convicted, and thus have placed upon him the stamp of eternal criminality as a draft evader.

For his devotion to duty and observance of his obligation to aid his native land in this hour of terrible stress and strain, Petitioner has been subjected to the ignominy of indictment, trial and conviction, and the consequent stigma of draft evasion, in time of war.

Thus, this is a matter of wide importance in the adminis-

tration of the Selective Training and Service Act, and is a matter of national interest, in the sense that it affects the majority of the population of the United States, and an authoritative decision in the matter involved from this Most Honorable Court will go far toward producing that certainty in law and that uniformity in decision which is unquestionably desirable on a subject which, from its very nature, will necessarily arise continually until the present international struggle ceases.

For the reasons before stated, Petitioner earnestly urges that this Court grant its Writ of Certiorari directed to the Court of Civil Appeals for the Fifth Circuit and relieve this Petitioner from the unjust burden to which he is subjected by the terms of the judgment entered against him by said court.

Conclusion

It is respectfully submitted that the Writ of Certiorari prayed for in the Petition should issue.

Respectfully submitted,

BERNARD A. GOLDING,
Counsel for Petitioner

APPENDIX

U. S. C., TITLE 50, SEC. 311

Offenses and Punishment

Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval

law may be tried by court martial, and, on conviction shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act. Sept. 16, 1940, 3:08 P. M., E. S. T., c. 720, §11, 54 Stat. 894.

REGULATION 641.3

Communication by Mail. It shall be the duty of each Registrant to keep his local Board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not.

REGULATIONS 642.1-642.5

DELINQUENCY

642.1—*Mailing Notice of Delinquency.* (a) When a local board has reason to believe that a nonregistrant under its jurisdiction is a delinquent or that a registrant under its jurisdiction has become a delinquent, the board shall prepare, in quadruplicate, a Notice of Delinquency (Form 281).

(b) The local board shall mail the original of the Notice of Delinquency (Form 281) to the suspected delinquent at his last known address. It shall mail a copy to the State Director of Selective Service. It shall post a copy in a conspicuous place for public inspection, and, whenever practicable, it shall give the information contained thereon to the press and radio and shall encourage them to give such in-

formation the widest possible publicity. It shall file the fourth copy with the date of mailing noted thereon.

(c) If the suspected delinquent is a registrant under the jurisdiction of the local board, the local board shall note in the "Remarks" column of the Classification Record (Form 100) the fact that the notice was mailed and file the fourth copy of the Notice of Delinquency (Form 281) in the registrant's Cover Sheet (Form 53).

642.2—*Investigation of Delinquency.* (a) After mailing the Notice of Delinquency (Form 281), *the local board shall wait 5 days before taking further action.*

(b) If it does not hear from the suspected delinquent during the 5-day period, the local board shall take the following steps:

(1) Communicate with the person 'who will always know' the registrant's address whose name and address appear on the 'Registration Card' (Form 1).

(2) Communicate with the 'employer' whose name and address appear on the Registration Card (Form 1).

(c) If as a result of these contacts the local board acquires any information which will enable it, with a reasonable amount of effort, to locate the suspected delinquent, it should make that effort.

(d) In trying to locate the suspected delinquent the local board may use the voluntary assistance of local or State police officials, as well as the press and radio. In no event, however, will the local board order or participate in the arrest of a suspected delinquent.

642.3—*Disposition of Delinquencies. If a suspected delinquent has been located as a result of the local board's ef-*

forts under Section 642.2 or a suspected delinquent has reported voluntarily to a local board, the local board shall carefully investigate the delinquency. If the board finds that the suspected delinquent is innocent of any wrongful intent, the local board shall proceed to consider his case just as if he were never suspected of being a delinquent. The local board shall report its decision to the State Director of Selective Service and shall note its decision in its records.

642.4—*Reporting Delinquents to the United States District Attorney.* (a) If the local board is convinced that a delinquent is not innocent of wrongful intent or if it is unable to locate a suspected delinquent (see Sec. 642.2), the local board shall report him to a United States District Attorney for prosecution under Section 11 of the Selective Training and Service Act of 1940, as amended.

(b) In reporting a delinquent to a United States District Attorney, the local board shall fill out a Report of Delinquents to United States District Attorney (Form 279), in Quadruplicate. The local board shall mail the original to the United States District Attorney. It shall mail a copy to the State Director of Selective Service. It shall post a copy in a conspicuous place for public inspection, and whenever practicable, it shall give the information contained thereon to the press and radio and shall encourage them to give such information the widest possible publicity. It shall note the date of mailing on the fourth copy and shall place it in the registrant's Cover Sheet (Form 53), if the delinquent is a registrant, or in an alphabetical file of nonregistrant delinquents, if the delinquent is not a registrant.

(c) If the delinquent is a registrant, the local board shall note its action in the "Remarks" column of the Classification Record (Form 100).

642.5—*Local Board action subsequent to reporting a delinquent to United States District Attorney.* When a delinquent who has been reported to a United States District Attorney later offers to comply with the law, the United States District Attorney should be immediately notified and give a complete statement of the facts concerning such offer of compliance. The decision of whether such delinquent should be prosecuted or his prosecution continued, in case it has already been undertaken, rests entirely with the United States District Attorney. The local board, when requested to do so by the United States District Attorney, may offer a suggestion as to the advisability of discontinuing the prosecution of a delinquent who has complied or is willing to comply with the law. *If it is determined that the delinquency is not willful, or that substantial justice will result, the local board should encourage the delinquent to comply with his obligations under the law, and if he does so or offers to do so, should urge that any charge of delinquency against him or any prosecution of him for delinquency be dropped.*

EXHIBIT A

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 10333

HOMER LESTER BARTCHY, ALIAS HOMER BROOKS, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the District Court of the United States for the Southern District of Texas.

(December 23, 1942.)

BEFORE HUTCHESON, HOLMES AND MCCORD, Circuit Judges.

HOLMES, Circuit Judge: Appellant, a registrant under the Selective Training & Service Act of 1940, was found guilty of knowingly failing to keep his local draft board advised at all times of the address where mail would reach him, in violation of Section 11 of the Act.[1] The only decisive question is whether there was substantial evidence to support the finding of the court below, the case having been tried without a jury.

These are the determinative facts, as to which there is no dispute: Prior to February 4, 1942, appellant had been placed in Class 1A by his local draft board, and had passed his pre-induction physical examination. On or about that date he was advised by the board that he probably would be inducted

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[1] 50 U. S. C. A., Sec. 311.

within twenty-five or thirty days. On February 10, 1942, appellant wrote to his local board and stated that he was that day shipping as a seaman aboard a named merchant vessel; that he would return within two weeks; and that he could be reached by mail addressed in care of the National Maritime Union in Houston, Texas. He did not ship aboard the vessel named, giving as his reason therefor the belated discovery that the ship was to take a three-month voyage, and that he could not be absent from Houston more than twenty days in view of his draft status. The following day he shipped aboard another merchant vessel, bound for New York; and the Union was advised to forward his mail to the offices of the Union in New York City. Prior to this voyage appellant had never worked as a seaman, but he claimed occupational deferment as a seaman in the merchant marine in his letter of February 10, 1942, to the local board.

Upon his arrival in New York on February 20, 1942, appellant called at the Union offices, but no mail had yet arrived for him. He signed off the vessel on which he had come, and did not attempt to secure passage on any other returning to Houston; but, on February 25th, he shipped aboard a vessel being repaired in Hoboken, N. J., for a foreign voyage. He remained aboard this ship from February 25, 1942, until March 11, 1942, during which time he did not communicate in any way with the Union offices in New York or with his draft board. He testified that it was his intention, in the event he received no communication from his draft board prior to sailing time of the vessel, to ship on the voyage in foreign commerce from which he would not return for several months. Meanwhile, on February 20, 1942, the draft board mailed to appellant a notice to report for induction on March 4, 1942. This notice was forwarded to the offices of the Maritime Union in New York, but was returned unopened to the draft board with a letter advising that appellant had sailed upon a foreign voyage prior to the arrival of the notice. The

local board notified the Federal Bureau of Investigation of appellant's delinquency, and he was taken into custody in New York on March 11, 1942, shortly before the vessel on which he had signed was scheduled to begin its foreign voyage.

Article 641.3 of the selective service regulations, promulgated under Section 10 of the Selective Training & Service Act of 1940, places an affirmative duty upon every registrant under the Act to keep his local draft board advised at all times of the address where mail will reach him. The finding of the court below that appellant failed in the discharge of this duty is supported by substantial evidence. Moreover, appellant's conduct in shipping aboard a vessel bound in foreign commerce, with the acknowledged intent to absent himself from the United States for a period of several months if he received no communication from his draft board before the sailing date, and his failure to contact the Union or the local board at any time during the crucial two-weeks period when his notice of induction was due, supports the inference that he not only failed to do what was required of him to effectuate the communication of notice but also affirmatively endeavored to avoid delivery of the communication.

The judgment is

AFFIRMED.

HUTCHESON, Circuit Judge, Dissenting:

Appellant, a registrant under the Selective Training and Service Act of 1940 was prosecuted under an indictment in two counts. The first charged that, called to report and submit himself for induction into the armed forces of the United States on March 4, 1942, and therefore under a duty so to do, he, in violation of the Selective Training and Service Act, Sec. 311, Title 50, U. S. C. A., failed and neglected to perform the duty so required of him. The second charged that the defendant was registered with local draft board No. 9, that

in accordance with the provisions of the Selective Training and Service Act of 1940 and the rules and regulations prescribed thereunder, it was his duty to keep the draft board advised at all times of the address where mail would reach him, and that, in violation of that duty, he knowingly, willfully and feloniously did fail and neglect to keep the local draft board so advised. Defendant demurred to the indictment and each count thereof. The demurrers overruled, he pleaded not guilty and, upon his request with the approval of the court and the United States Attorney, a jury was waived and all questions of fact as well as of law were submitted to the court. At the conclusion of the trial there was a verdict and finding of not guilty of, failure to report for induction as charged in count one of the indictment and of guilty of, failure to keep the draft board advised of the address where mail would reach him as charged in count two. This appeal followed a judgment and sentence of sixty days on that count. Appellant is here insisting that his demurrer to count two of the indictment was well taken and that that count should have been dismissed. He makes the further insistence that, the evidence,[1] without conflict, every fact testified to consistent with every other fact, no witness disputing the testimony of any other, the facts thus disclosed are wholly insufficient to establish beyond a reasonable doubt that appellant failed to keep his local draft board advised at all times of the address where mail would reach him. I think it clear beyond any pos-

[1] These are the undisputed facts as the record discloses them: Defendant was registered with Local Draft Board No. 9 in Houston, Texas. When he registered he gave his address as 7428 Sherman Street, Houston, Texas. He completed his selective service questionnaire, was given a preliminary physical examination, and was, on January 20, 1942, classified 1-A by the Board. On February 3, 1942, Appellant was given an Army physical examination. At the time of this physical examination the address which the Board had for the registrant was 7543 Harrisburg Boulevard, Houston, Texas. On about February 4, 1942, the Appellant came to the office of the Local Board and asked how much time he would have before induction. He was advised that he would be inducted in about twenty-five or thirty days. On February 10, 1942, Appellant advised the Board by letter that he was shipping

sibility of doubt both that the second count of the indictment states no offense and that if it does, the evidence fails to establish its commission. The government, the district judge, and the majority, considering only the first sentence of the regulation, "It shall be the duty of each Registrant to keep his Local Board advised at all times of the address where mail will reach him," and failing to consider it as a whole, fell into the error of completely misapprehending its meaning and effect, and, therefore, of assuming that the regulation imposed the duty of keeping the Board advised from day to day of Registrant's whereabouts and that the failure to do so constituted an offense. The reading of the regulation as a

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as a seaman aboard the steamship Caliche, and gave his address as the National Maritime Union, 8045 Harrisburg Boulevard, Houston, Texas:

"Tuesday, February 10, 1942.

Selective Service Board No. 9,
504 Hermann Bldg.,
Houston, Texas.

Dear Sirs:

In accordance with your regulations, I am notifying you that I have today shipped as a seaman aboard The S. S. Caliche. I have asked the Company and the office of the National Maritime Union 8045 Harrisburg Blvd., to also notify you.

I do not want you to in any way believe that I am seeking to safeguard my life from service on behalf of our countries fight against Hitlerism. On the contrary I am told that because of recent sinkings the casualty list among Merchant Seamen is as high or higher than in any other section of Service.

However, I prefer service in the Merchant Marine to any other branch of service because of the dependent which I have acquired recently—too recently to be recognized by your board—and since the Maritime Commission and the Federal Government have appealed for young men to join the Merchant Marine to replace those being sunk and to man the new ships being built I have volunteered for this branch of our countries defense effort.

In the event that you do not consider my service as an active seaman deferable you may communicate with me at my new mailing address 8045 Harrisburg Blvd., care National Maritime Union. The trip I am shipping on will not last more than two weeks, and since I have not received from you yet either the final report on my physical examination, or an order giving me the date of induction, and since I was told by your

whole in the light of the Selective Service Act, its provision and purpose, makes quite clear that the regulation had one purpose and effect and one only. That purpose and effect was to advise the registrant that the Board would rely in sending out its communications upon the address last given and if he did not want it to continue to use that address, he should advise it of any change. It had neither the purpose nor the effect of making it an offense for the registrant to stick to his original address. This is the regulation in whole:

> "641.3 Communication by mail. It shall be the duty of each Registrant to keep his local Board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

What it intends to, and does, accomplish, is this: when the registrant gives his address at time of registration, he must

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board that I would have from 25 to 30 days after my physical examination (most probably), I believe that in the event you decide to induct me into the army that I shall be back in Houston before the effective date of induction.

Please send your decision to me at 8045 Harrisburg Blvd., Houston.

Sincerely Yours,

HOMER L. BARTCHY,
HOMER LESTER BARTCHY,
8045 Harrisburg Blvd.,
Order No. 2671.11."

On the same date Appellant advised the Board by telegram that he was sailing on the steamship Pan-Maine. On February 11, 1942, the Appellant actually sailed aboard the steamship Pan-Rhode Island, arriving in New York on February 20, 1942. There he went to the New York office of the N. M. U. and reported to James Merrell, the person in charge for N. M. U. of placing and keeping up with men furnished by it for signing on merchant vessels. Explaining his situation fully and telling Merrell that he expected to hear from his draft board by a communication forwarded from the N. M. U. office in Houston to

expect that address to serve as the one for the Board to communicate with him by, and if he doesn't notify the Board of a change of address, he must expect to be bound by notices sent to that address whether he receives them or not, and to abide the consequences of their sending though they were not received. Thus the regulation puts the responsibility for his failure to actually receive notices upon the registrant and not upon the board, and it instructs him that if he wants to be sure that he will actually and not merely constructively receive notices, he must keep the board advised of changes of address. At the same time, it tells him that his last reported address will be a sufficient address for all the purposes of the Board and that the mailing of any order or communication to the last address given by him shall constitute notice to him and lay him liable for prosecution for failure to obey it

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the N. M. U. office in New York, and charging Merrell to send it at once to him, defendant on February 25, in New York signed on the steamship American Packard for a foreign voyage, expecting to be notified if called by the Board. He remained on board this vessel continuously from February 25, 1942, until March 11, 1942, awaiting its departure, as it was being delayed by repairs and other things, and he was required to be there and ready at all times. Before he left Houston he explained the whole thing to the agent for the N. M. U., whose office he had given as his address there and asked that all communications be forwarded. On February 20, 1942, an order to report for induction was mailed by the Local Board directing the Appellant to report on March 4, 1942. This order was mailed not to the address last given but to 7543 Harrisburg Boulevard. This order found its way to the National Maritime Union office at 8045 Harrisburg Blvd., Houston, Texas, and was forwarded to the National Maritime Union office at New York, where it was received by James F. Merrell, and returned by him to the Local Board. Communicated with by the Board, after they had received the return of their induction order, Merrell explained the situation fully to them, pointed out the great necessity for men on merchant ships and urged the Board to defer defendant until he could make the trip he had undertaken. Without following the regulations which require the board to carefully consider whether a person registered is a willful or unintentional violator, the Board proceeded to turn the matter over to the District Attorney for prosecution, and the prosecution was immediately instituted. When advised that the Board considered defendant delinquent, Merrell made further inquiry, found that defendant's ship had not sailed, notified him that the F. B. I. wanted him on a charge in Houston, and defendant came in and surrendered.

whether or not he actually receives the notice. If in this case the board had mailed his notice of induction to the last address he gave, he would have been without defense to the first count for, constructively presumed to have received his notice, he was under the imperative duty to report for induction at the time named in it, and he did not report. He was, however, acquitted on this count, and we do not have to give it further consideration. The charge made against him under the second count that he did not keep the board advised of an address where mails could reach him states no offense at all. For the regulation invoked expressly provided that the Board will always mail to his last address given, and that he will be conclusively presumed to have received notices sent by the Board to that address. Any failure, therefore, to keep the Board advised of a change of address is not a failure of duty for which he can be indicted as a criminal, it is merely a failure of self protection as a result of which he may find himself subject to indictment as a criminal for failure to obey an order or communication, notice of which he did not actually receive. The demurrer should have been sustained and this count of the indictment should have been dismissed as charging no offense. If, however, I am wrong in this I think it crystal clear that the government completely failed to show not only beyond a reasonable doubt but by the preponderance of the evidence that defendant willfully and knowingly violated his duty to keep his local board advised of an address where mail would reach him. In the first place he selected the address of the union which he had joined and which keeps close tab on all its members. In the second place he left explicit directions to forward mail to him in care of the N. M. U. in New York. When he got to New York he left the same specific directions with the agent of the N. M. U. and to deliver to him any notices received from the board, and if the agent of the N. M. U. in New York had done what he had been told

to do, defendant would have received the notice. It got there while defendant was still in New York and it was not delivered to him, not because of his failure in choosing an address, but because of the fault of the agent of the union in returning the letter to Houston. It just cannot be held that the address he gave was not an address by which mail would reach him when the proof showed that, had the careful directions he gave been carried out, he would have gotten the mail, and that he was actually contacted through that address. I realize that if the evidence supports the conviction, the fact that to fill a crying need for men he was entering upon a most dangerous service for his country would not save him. But the service he was offering to do and the crying need he was filling, according to the undisputed testimony of Merrell, along with the balance of the evidence furnishes the guide by which to determine whether he was willfully evading a duty or was doing the best he could to keep the board informed of his address while serving his country.

> "And here is the place to pay a tribute to our Merchant Marine. Officially this is not one of our fighting forces, but I doubt if there is a more dangerous service. The merchant seaman risks bombs, torpedoes, mines, machine gunning, in addition to the usual perils of the sea, and often faces death in a form more terrible than any known on the battle field. He wears no fancy uniform, no bands play for him, or nobody calls him a hero—I heard of one man who had been torpedoed six times—yet back they go over and over again to their ship."[2]

In my opinion, the prosecution and conviction by which this defendant, while voluntarily serving his country on a most dangerous mission, was stigmatized, sentenced to jail, and in effect marked as a fugitive from duty, was wholly unwarranted and unjust. The judgment of conviction should be

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[2] Britain at War, J. B. Priestley, Harper & Bro.

reversed and the indictment dismissed. I dissent from the affirmance of the judgment.

A True copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.